Supreme Court, U.S.
FILED
MAR 5 - 2007
OFFICE OF THE CLERK

(4)

No. 06-1034

IN THE

Supreme Court of the United States

JODIE SMOOK, Individually and on behalf of all other persons similarly situated,

Petitioners,

v.

MINNEHAHA COUNTY, SOUTH DAKOTA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF

JAMES ABOUREZK
ABOUREZK LAW OFFICES, P.C.
P.O. Box 1164
Sioux Falls, SD 57103
(605) 334-8402

FABIO ARCILA, JR.
TOURO LAW CENTER
225 Eastview Drive
Central Islip, NY 11722
(631) 761-7111

MATTHEW J. PIERS
Counsel of Record
MARY M. ROWLAND
JULIET BERGER-WHITE
CARA A. HENDRICKSON
HUGHES SOCOL PIERS RESNICK & DYM, LTD.
Three First National Plaza
70 W. Madison St., Suite 4000
Chicago, IL 60602
(312) 580-0100

Counsel for Petitioners

207201

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF CITED AUTHORITIES ii

REASONS FOR GRANTING THE PETITION ... 1

I. This Damages Action on Behalf of the Petitioner Class Has Not Been Mooted by Modifications to the Strip Search Policy. ... 1

II. Certiorari Should Be Accepted At This Stage To Resolve An Important Constitutional Issue Of National Importance And To Provide Critical Guidance On Remand; the Court Should Grant Certiorari Despite the Interlocutory Nature of the Appeal. 3

III. An Important Circuit Split Exists and Warrants Resolution by This Court. 6

CONCLUSION 8

TABLE OF CITED AUTHORITIES

Page

CASES:

Bell v. Wolfish, 441 U.S. 520 (1979) 7

Bhd. of Locomotive Firemen & Enginemen v. Bangor & Aroostook R.R. Co., 389 U.S. 327 (1967) 5

Buckhannon Bd. & Care Home, Inc. v. West Virginia Dep't of Health & Human Res., 532 U.S. 598 (2001) 3

Central Bank of Denver v. First Interstate Bank of Denver, 511 U.S. 164 (1994) 4

Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976) ... 4

Estelle v. Gamble, 429 U.S. 97 (1976) 4

Hamilton-Brown Shoe Co. v. Wolf Bros. & Co., 240 U.S. 251 (1916) 6

Justice v. City of Peachtree, 961 F.2d 188 (11th Cir. 1992) 1, 7

Kremens v. Bartley, 431 U.S. 119 (1977) 3

Land v. Dollar, 330 U.S. 731 (1947) 4

Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682 (1949) 4

Mills v. Elec. Auto-Lite Co., 396 U.S. 375 (1970) 4

Cited Authorities

Page

N.G. v. Connecticut, 382 F.3d 225 (2d Cir. 2004) .. 6

Northeastern Florida Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville, 508 U.S. 656 (1993) 3

Powell v. McCormack, 395 U.S. 486 (1969) 3

Rumsfeld v. Forum for Academic & Institutional Rights, Inc., 126 S.Ct. 1297 (2006) 4

Virginia Military Inst. v. United States, 508 U.S. 946 (1993) 5

UNITED STATES CONSTITUTION:

U.S. CONST. amend. IV 4, 5, 6

STATUTE:

28 U.S.C. § 1254 4

REASONS FOR GRANTING THE PETITION

Minnehaha County's three arguments against certiorari each lacks merit. First, the changes to the strip search policy of the Minnehaha County Juvenile Detention Center ("JDC") do not render this case moot because petitioners are litigating live damages claims for unconstitutional searches conducted under the old policy as well as those that persist even under the revised policy. Second, the interlocutory nature of this appeal is no bar to certiorari, and the fact that the Eighth Circuit's decision below effectively resolved the critical legal issue on petitioners' facial challenge strongly counsels in favor of granting review. Third, a well-developed 10-2 circuit split exists on the central issue presented in this petition: whether juveniles in pretrial detention may be constitutionally strip searched absent any individualized consideration (two cases) even though adults under similar circumstances may not be (ten cases).[1]

I. This Damages Action on Behalf of the Petitioner Class Has Not Been Mooted by Modifications to the Strip Search Policy.

Minnehaha County mistakenly asserts that petitioners' claims are moot because "the JDC has adjusted its policy to discontinue the conduct of which Petitioner complains." Br. Opp'n 2. This assertion is absolutely false, and Minnehaha County's mootness argument is a red herring.[2]

---

[1] In addition to conflicting with the ten circuit court opinions to consider a policy of strip searching adults arrested for minor offenses, the Eighth Circuit opinion is also at odds with a circuit court opinion considering such a policy as applied to juveniles. *See Justice v. City of Peachtree*, 961 F.2d 188 (11th Cir. 1992).

[2] Minnehaha County did not raise this mootness argument either at summary judgment or in front of the Eighth Circuit.

After named-plaintiff Jodie Smook's unconstitutional search in August 1999, the JDC twice changed its strip search policy. In September 1999, it provided that a limited category of juveniles charged with "minor offenses" would be subject to a two-hour grace period before a strip search would be conducted. *See* Pet. Cert. 3-4. Following the passage of a South Dakota statute in February 2000, it further amended its policy to provide that no juveniles charged with a curfew violation would be strip searched without probable cause. *See id.* at 4 n.4. *See also* Pet. App. 4a-5a; 42a-44a (describing policy changes). Both modifications occurred well before the Complaint in this matter was filed in November 2000.

Contrary to language in Minnehaha County's brief, *see* Br. Opp'n 4-5, the JDC policy still, to the present day, provides for strip searches without reasonable suspicion for every juvenile charged with minor or non-felony offenses except for those charged with curfew violations.[3] Minnehaha County completely ignores the fact that petitioners represent a class of juveniles who have been strip searched pursuant to JDC policies. Petitioners are litigating live claims that relate not only to unconstitutional searches conducted under the JDC's old policy, but also unconstitutional searches that persist under the JDC's revised policy. Petitioners have legally cognizable interests in the outcome of these live claims, regardless of the revised policy,

---

[3] The JDC's universal strip search policy applies to juveniles charged with a wide range of offenses, including offenses such as truancy, failure to appear, and tobacco use. There are 18 different offenses that qualify as "non-felony" offenses, as to which no waiting period applies before juveniles are strip searched. Pet. Cert. 5 n.5. There are three offenses (in addition to curfew violations) that qualify as "minor" offenses. The JDC's two-hour wait policy applies only to such minor offenses; after the expiration of that period, these alleged offenders are also strip searched. *Id.* at 3-4.

and thus mootness is inapplicable. *See Northeastern Florida Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville,* 508 U.S. 656, 661-62 (1993) (when new ordinance disadvantaged petitioners in the same fundamental way, gravamen of complaint undisturbed and case not moot).

Even more importantly, petitioners are only seeking damages relief in this action. As petitioners explained in their petition, certiorari is not sought as to the Eighth Circuit's holding that the class lacks standing to seek injunctive relief. *See* Pet. Cert. 7 n.7. Because the relief sought is limited to damages for incurred or prospective constitutional violations, this case cannot be mooted by a change in the JDC's policy. "[S]o long as the plaintiff has a cause of action for damages, a defendant's change in conduct will not moot the case." *Buckhannon Bd. & Care Home, Inc. v. West Virginia Dep't of Health & Human Res.*, 532 U.S. 598, 608-09 (2001). The claims for damages brought by Smook and the other members of the petitioner class cannot be mooted by the JDC's actions, and are not mooted by the loss of injunctive relief. *See Powell v. McCormack*, 395 U.S. 486, 495-500 (1969) (where petitioner's claim for injunctive relief challenging his exclusion from Congress was mooted by his reelection, claim for damages remained a live controversy); *cf. Kremens v. Bartley,* 431 U.S. 119, 129 (1977) (claims were mooted by legislative action when class sought only injunctive relief).

II. Certiorari Should Be Accepted At This Stage To Resolve An Important Constitutional Issue Of National Importance And To Provide Critical Guidance On Remand; the Court Should Grant Certiorari Despite the Interlocutory Nature of the Appeal.

This Court indisputably has jurisdiction to review interlocutory decisions of federal courts of appeals; it is not a requirement of certiorari that the underlying decision be final

or that a final judgment exist. *See* 28 U.S.C. § 1254. The Court should exercise its discretion to grant certiorari in this case, despite the technically interlocutory nature of the appeal, because the Eighth Circuit effectively decided the fundamental constitutional question raised in petitioners' facial challenge and no further disposition by the district court will aid in, or obviate the need for, this Court's ultimate resolution of that issue. This Court has, on many occasions, taken cases in an identical procedural posture as this one,[4] or with even less of a record.[5]

The Eighth Circuit's ruling that the Fourth Amendment does not prohibit the JDC's universal policy under which Smook was strip searched resolved the critical legal issue in this case. Consequently, the "resolution of this basic issue should be made at this stage of the litigation and not postponed until [further proceedings] under the Court of Appeals' decision." *Mills v. Elec. Auto-Lite Co.*, 396 U.S. 375, 381 (1970) (granting certiorari after court of appeals reversed and remanded district court's summary judgment ruling for plaintiffs). This is especially so because determination of this important issue is "fundamental to the further conduct of the case" on remand. *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 685 n.3 (1949) (internal quotation and citation omitted).[6]

---

[4] *See Central Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164, 168-70 (1994) (granting certiorari when court of appeals reversed and remanded district court's granting of summary judgment); *accord Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 191-93 (1976); *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970).

[5] The district court proceeding here was decided on summary judgment. *Compare Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 126 S. Ct. 1297, 1304 (2006) (preliminary injunction); *Estelle v. Gamble*, 429 U.S. 97, 99 (1976) (motion to dismiss); *Land v. Dollar*, 330 U.S. 731, 734 n.2 (1947) (same).

[6] The Eighth Circuit declined to decide the constitutional question with respect to petitioner class members who were stripped completely

(Cont'd)

Moreover, this case presents a facial challenge to the JDC's written strip search policy, so further development of the record would not aid this Court's review. Petitioners and respondent agree that the question before this Court is whether the Fourth Amendment prohibits a policy that "in all instances" requires juveniles to be strip searched. Pet. Cert. i; Br. Opp'n i. There is no dispute that the policy demands such searches, without *any* individualized consideration, for all offenses except (since February 2000) curfew violations. Nor is there any other dispute regarding any material fact; the parties cross moved for summary judgment in front of the district court.

Minnehaha County claims that further district court proceedings could make it unnecessary for the Court to "address any number of the questions currently presented in this case," Br. Opp'n 5, though it fails to identify even one such possibility. To the contrary, further proceedings below will not obviate this Court's role in determining questions raised by class members, like Smook, who were or will be stripped nearly naked and who no longer have valid claims under the Eighth Circuit's reasoning. These class members will have the same legal challenge to the policy as exists today.[7]

(Cont'd)
naked, *see* Pet. App. 15a-17a, however, its *in loco parentis* analysis is dangerously broad and potentially equally applicable to the remaining petitioners in this case.

[7] The cases Minnehaha County cites in its interlocutory appeal argument are distinguishable. *See* Br. Opp'n 6. In some of them, the district court—unlike in this case—had not determined matters critical to the disposition of the case. *See Virginia Military Inst. v. United States*, 508 U.S. 946 (1993) (district court had not yet proposed one of the potential remedial plans court of appeals had suggested); *Bhd. of Locomotive Firemen & Enginemen v. Bangor & Aroostook R.R. Co.*, 389 U.S. 327 (1967) (in case involving contempt order, appellate court had remanded for determination of whether and to what extent

(Cont'd)

III. An Important Circuit Split Exists and Warrants Resolution by This Court.

Minnehaha County misapprehends petitioners' argument when it asserts that "Petitioner ignores . . . that the court of appeals clearly differentiated the adult search cases from those involving juveniles in reaching its decision." Br. Opp'n 7. Quite the contrary: petitioners' acknowledgment of this analysis forms the very basis of their certiorari petition because petitioners seek this Court's review of whether such a distinction is warranted under Fourth Amendment jurisprudence. For all the reasons explained in petitioners' certiorari petition, it is not.

Notably absent from Minnehaha County's opposition brief is any direct rebuttal to the fulsome explanation the certiorari petition provides for why the Eight Circuit's ruling below, and the Second Circuit's preceding decision in *N.G. v. Connecticut,* 382 F.3d 225 (2d Cir. 2004), cannot be reconciled with this Court's Fourth Amendment cases. In applying a Fourth Amendment balancing test, this Court has repeatedly eschewed bright line rules, required a meaningful consideration of less intrusive but equally effective search alternatives, and demanded a governmental record demonstrating the necessity of intrusive and traumatic searches. *See* Pet. Cert. 9-24. Minnehaha County's opposition brief is silent on these matters because it cannot contest them.

Instead, Minnehaha County attempts to avoid certiorari merely by engaging in an invalid tautology: it seeks to defend the ruling below by presuming that it is correct. Specifically,

---

(Cont'd)

contemptuous behavior had actually occurred). In another case, the district court had not resolved a damages issue, and unlike here, the certiorari petition did not raise any question of public interest or general importance, and no conflict existed between federal circuits. *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916).

respondent relies wholly upon the distinction between adults and juveniles, repeating the illegitimate mantra that the County's *in loco parentis* responsibility towards juveniles allows it to strip search them under circumstances in which it could not strip search adults.[8] Br. Opp'n 7-9. But the validity of this distinction is precisely the issue in dispute, and thus the properly formulated circuit split is the 10-2 split (adults v. juveniles) described in the certiorari petition. *See* Pet. Cert. 10-12.

Finally, Minnehaha County fails in its attempt to discredit petitioners' reliance upon the Eleventh Circuit's decision in *Justice v. City of Peachtree,* 961 F.2d 188 (11th Cir. 1992). Petitioners cite *Justice* for the proposition that the state's interest in searching for contraband is the same regardless of whether the detainee is a juvenile or adult. *See* Pet. Cert. 21. Minnehaha County misses this point when it criticizes petitioners for "ignor[ing]" that *Justice* found constitutional a juvenile strip search conducted under reasonable suspicion. Br. Opp'n 9. First, Minnehaha County takes an unjustifiably cramped view of the Eleventh Circuit's reasoning in *Justice. See* 961 F.2d at 191-94. Calling its result "troubl[ing]," and despite the fact that "the strip search of a juvenile based on less than probable cause 'instinctively gives us the most pause,'" the Eleventh Circuit held that law enforcement may strip search a juvenile "based on reasonable suspicion to believe that a juvenile is concealing weapons or contraband." *Id.* at 193 (citing *Bell v. Wolfish,* 441 U.S. 520, 558 (1979)). The Eleventh Circuit's serious concern with upholding a strip search policy that required a reasonable suspicion determination strongly suggests that a policy that required *no* individualized considerations would be found, under its analysis, unconstitutional. *See id.* at 191-94. Second, the *Justice* ruling is based in part on its finding that the state interest

[8] The invalidity of this distinction is explained both in the certiorari petition and in an amicus brief supporting it. *See* Pet. Cert. 14-15, 18-19; Amicus Curiae Brief Of Juvenile Law Center In Support of Petition for a Writ of Certiorari 13-18.

in detecting contraband is *the same* for juvenile and adult detainees, *ibid*, which is in conflict with the Eighth Circuit's reasoning that Minnehaha County has *enhanced* responsibilities for detecting contraband when juveniles are involved. *See* Pet. Cert. 21.

CONCLUSION

For the reasons set forth above and in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted,

JAMES ABOUREZK
ABOUREZK LAW OFFICES, P.C.
P.O. Box 1164
Sioux Falls, SD 57103
(605) 334-8402

FABIO ARCILA, JR.
TOURO LAW CENTER
225 Eastview Drive
Central Islip, NY 11722
(631) 761-7111

MATTHEW J. PIERS
Counsel of Record
MARY M. ROWLAND
JULIET BERGER-WHITE
CARA A. HENDRICKSON
HUGHES SOCOL PIERS RESNICK & DYM, LTD.
Three First National Plaza
70 W. Madison St., Suite 4000
Chicago, IL 60602
(312) 580-0100

Counsel for Petitioners